

**No. 77-1493**

Supreme Court, U. S.  
FILED

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1977**

**GLADSTONE, REALTORS,<sup>®</sup> et al.,**  
*Petitioners,*  
**vs.**

**VILLAGE OF BELLWOOD, et al.,**  
*Respondents.*

**ROBERT A. HINTZE, REALTORS,<sup>®</sup> et al.,**  
*Petitioners,*  
**vs.**

**VILLAGE OF BELLWOOD, et al.,**  
*Respondents.*

**On Petition For A Writ of Certiorari To The United States Court  
Of Appeals For The Seventh Circuit**

**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The opinion of the Court of Appeals, which is reported at 569 F.2d 1013 (7th Cir. 1978), appears in the Appendix hereto. *Appendix* 151-163. The opinions rendered by the

United States District Court for the Northern District of Illinois, which are unreported, are also contained in the Appendix hereto. *Appendix* 83-89, 148.

### **JURISDICTION**

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 25, 1978. The petition for certiorari was granted on June 12, 1978. This Court's jurisdiction is invoked pursuant to Section 1254(1) of Title 28, United States Code.

### **QUESTION PRESENTED**

Whether natural persons and municipalities, who are not direct victims of discrimination in the sale or rental of housing, have any right under Article III of the United States Constitution and Sections 1982, 3604 and 3612 of Title 42, United States Code, to bring suit against real estate brokers whom they allege to have engaged in racial steering, on the theory that racial steering interferes with such persons' generalized interest in living in an integrated society.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

United States Constitution, Article III, Section 2, Clause 1:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming

Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code, Title 42:

#### **§ 1982. Property rights of citizens**

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

#### **§ 3602. Definitions**

As used in this subchapter—

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

#### **§ 3604. Discrimination in sale or rental of housing**

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or dis-



crimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

#### § 3610. Enforcement

Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under

this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year.

Complaint; limitations; answer; amendments; verification

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

Notification of State or local agency of violation of State or local fair housing law; commencement of State or local law enforcement proceedings; certification of circumstances requisite for action by Secretary

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with

reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

Commencement of civil actions; State or local remedies available; jurisdiction and venue; findings; injunctions; appropriate affirmative orders

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with the subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

#### Burden of proof

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

Trial of action; termination of voluntary compliance efforts

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or sections 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

#### § 3612. Enforcement by private persons

Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however*, That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however*, That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security



(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

### STATEMENT OF THE CASE

On October 25, 1975, six individual plaintiffs, the Village of Bellwood, Illinois, and the Leadership Council for Metropolitan Open Communities filed an action in the United States District Court for the Northern District of Illinois, alleging that Gladstone, Realtors,® and six of its salespersons had engaged in the practice of "racial steering" of prospective home purchasers in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982, and the Fair Housing Act of 1968, 42 U.S.C. § 3604. *Appendix 4-7*. Federal jurisdiction was alleged under 28 U.S.C. §§ 1343(4) and 2201, as well as 42 U.S.C. § 3612. On the same date, the same plaintiffs filed a substantially identical complaint against defendants Robert A. Hintze, Realtors,® and three of its employees. *Appendix 97-100*. Gladstone, Realtors,® and

Robert A. Hintze, Realtors,® are both real estate brokerage firms doing business in Bellwood, Illinois. *Appendix 5, 98*.

### The Plaintiffs

The individual plaintiffs in both actions are four white residents of Bellwood, a black resident of Bellwood, and a black resident of another municipality. *Appendix 4-5, 32-37, 97, 121-25*. Initially, plaintiffs alleged two distinct injuries: that they had "been denied their right to select housing without regard to race and [that they had] been deprived of the social and professional benefits of living in an integrated society." *Appendix 6, 13*. In response to defendants' requests for admissions, however, the individual plaintiffs admitted that they had acted only as investigators or testers; none of them had intended to purchase or rent a home in Bellwood during the relevant time period. *Appendix 28, 32, 117, 121*.

Moreover, in answers to interrogatories, plaintiffs were unable to identify any bona fide homeseeker who they contended "used or sought to use [defendants'] services . . . and whose choice was influenced on the basis of race" or "who was discouraged from purchasing a home on the basis of race." *Appendix 28, 117*. Plaintiffs' interrogatory answers stated that the acts of the defendants which allegedly violated 42 U.S.C. § 1982 and §§ 3601 *et seq.* were reported in the testers' summaries of their visits to defendants' offices. *Appendix 27, 116*. Consequently, the individual plaintiffs' claim of injury rests solely on the generalized allegation that they were denied the benefits of living in an integrated society.

The Village of Bellwood also based its claim for relief on the generalized allegation that "the housing market in said village [was] wrongfully and illegally manipulated to the economic and social detriment of the citizens of such

village." *Appendix 6*, 99. The Village admitted that it had not expended any money as a result of the activities of which it complained. *Appendix 29*, 118.

The Leadership Council for Metropolitan Open Communities, a voluntary association dedicated to open housing, alleged that "[s]uch acts and practices . . . hamper and interfere with [its] work and purpose . . . and cost [it] money to provide an audit and other efforts to eliminate such unlawful acts." *Appendix 6*, 98-99.

### Relief Sought

In both cases, plaintiffs sought damages, a declaratory judgment, and injunctive relief. First, plaintiffs sought a declaratory judgment that the individual plaintiffs cannot be denied the right to inspect, negotiate for purchase, and purchase homes on the basis of race. Second, they asked that defendants be permanently enjoined from racial steering, from attempting to dissuade homeseekers from purchasing homes in particular areas because of racial characteristics, and from encouraging homeseekers to purchase homes in particular areas because of racial characteristics. Third, plaintiffs asked that they be awarded compensatory and punitive damages amounting to several hundred thousand dollars, as well as costs and attorneys' fees. *Appendix 6-7*, 99-100.

### Trial Court Proceedings

In July 1976, on the basis of plaintiffs' answers to interrogatories and formal admissions, defendants moved for summary judgment in both cases; they argued that plaintiffs had not established an actionable claim or standing to sue under Sections 1982, 3604, and 3612 of Title 42, and that they had failed to demonstrate the existence of a case or controversy under Article III of the United States Constitution. *Appendix 78-81*, 143-47.

On September 23, 1976, Judge Bernard Decker, to whom the *Gladstone* case was assigned, granted defendants' motion for summary judgment. *Appendix 83*. The district court found that the individual plaintiffs were merely investigators or testers, and that none of them had made any bona fide effort to purchase a home in Bellwood during the relevant period. Consequently, the individual plaintiffs could not have been denied the right to select housing without regard to race. At most, the individual plaintiffs could have suffered only the indirect or generalized injury of being denied the benefits of living in an integrated society. *Appendix 84-85*.

Relying on the Ninth Circuit's decision in *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), Judge Decker held that the individual plaintiffs lacked standing to sue because "a cause of action under § 3612 exists only for 'the direct victims' of a practice proscribed by § 3604." *Appendix 86*. The district court also held that plaintiffs' allegations of indirect injury failed to state a claim under Section 1982. *Appendix 29*. Finally, the district court held that neither the Village of Bellwood nor the Leadership Council had suffered a cognizable injury. *Appendix 84, 87, 89*.

On September 29, 1976, defendants' motion for summary judgment was granted in *Hintze*. The district court adopted Judge Decker's opinion in *Gladstone*, which it found dispositive, because "the complaint in the *aforecited* case is almost a verbatim duplicate of the complaint in the instant case." *Appendix 148*. A timely notice of appeal was filed in both cases (*Appendix 91, 149-50*), and they were subsequently consolidated for purposes of appeal.



### Seventh Circuit Proceedings

On January 25, 1978, the Court of Appeals for the Seventh Circuit reversed in part the decisions of the district court. The Court of Appeals held that the Leadership Council's "interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts." *Appendix 156-57*. The court also held, however, that the individual plaintiffs and the Village of Bellwood had stated a claim and had standing to sue under Sections 3604 and 3612. *Appendix 155, 156, 158, 163*. In view of its holding, the court declined to consider standing under Section 1982 separately. *Appendix 157, n.4*.

The Court of Appeals held that the individual plaintiffs, as residents of the Bellwood community, had standing to complain that they had lost the benefits of living in an integrated society. The Seventh Circuit relied on *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), in which this Court held that residents of an apartment complex had standing under Section 3610, another section of the Fair Housing Act, to complain that their landlord's rental practices had deprived them of the social and professional benefits of living in an integrated community. While noting that *Trafficante* was not technically controlling in the present case, the Court of Appeals held that "its thrust and rationale plainly suggest that the individual plaintiffs and the Village of Bellwood have standing." *Appendix 160*.

The Seventh Circuit explicitly rejected the *TOPIC* court's conclusion that Section 3612 should be construed more narrowly than Section 3610, although it acknowledged that that view was "not without some plausibility." *Appendix 159*.

With respect to the Village of Bellwood, the Court of Appeals found it unnecessary to determine "whether or not [the Village] would have standing if the sole injury alleged was the deprivation to its citizens of the benefits of integrated living [because] . . . it is apparent that specific concrete injury with a substantial nexus to the Village's status as a unit of government could be proved under these complaints." *Appendix 156*.

### SUMMARY OF ARGUMENT

The individual plaintiffs and the Village of Bellwood brought this action complaining that they had been injured indirectly by defendants' alleged racial steering of prospective homeseekers. The individual plaintiffs alleged that they had been "deprived of the . . . benefits of living in an integrated society." *Appendix 6, 99*. The Village of Bellwood alleged that its "housing market [had been] wrongfully and illegally manipulated to the economic and social detriment of its citizens." *Appendix 6, 99*.

Plaintiffs based their claims for relief on Sections 1982, 3604, and 3612 of Title 42, United States Code, but those sections do not create a right of action to redress the indirect and generalized injuries alleged by these plaintiffs, who were not good faith purchasers or renters. The language, remedial scheme, and legislative history of the Fair Housing Act show that Sections 3604 and 3612 grant immediate access to the federal courts only to persons whose rights to purchase or rent housing have been affected by discrimination. Likewise, Section 1982 offers no support for plaintiffs' claim.

Finally, even assuming that Congress intended to grant a right of action to persons who have not attempted to purchase or rent housing, these plaintiffs do not have standing to sue under Article III of the United States Constitution.

## ARGUMENT

### I.

#### **The Individual Plaintiffs And The Village Of Bellwood Are Not Direct Victims Of Discrimination, And Therefore Have No Right Of Action Under Sections 1982, 3604, And 3612, Title 42, United States Code.**

The threshold question in this case is one of federal statutory construction: whether Sections 1982, 3604, and 3612 of Title 42, United States Code, grant any right of action to persons who have not attempted to purchase or rent housing, but who claim to have been injured by the effects of discrimination allegedly practiced against others. Both the individual plaintiffs and the Village of Bellwood base their claims for relief under these sections on allegations of indirect injury. The individual plaintiffs have admitted that they never intended to purchase a home (*Appendix 32, 121*), and the Seventh Circuit found that these plaintiffs had stated a claim by alleging that they had been denied the "benefits of living in an integrated society." *Appendix 153, 155*. The court also held that the Village had stated a claim by alleging that it had been injured "by having [its] housing market . . . wrongfully and illegally manipulated." *Appendix 156*.

Section 1982 provides that all citizens "shall have the same right . . . as white citizens . . . to inherit, purchase, lease, sell, hold, and convey real . . . property." 42 U.S.C. § 1982. Section 3604 makes unlawful certain discriminatory practices relating to the sale and rental of housing. 42 U.S.C. § 3604. Section 3612 provides, in relevant part, that "[t]he rights granted by sections 3603, 3604, 3605,

and 3606 of this title may be enforced by civil actions." 42 U.S.C. § 3612(a). On their face, these sections promise relief only to persons who are direct victims of discrimination, in the sense of having been discriminated against in connection with the purchase or rental of housing. The Court of Appeals held, nonetheless, that Sections 3604 and 3612 permitted these plaintiffs to sue, based on their generalized allegation of injury.<sup>1</sup>

The Seventh Circuit's holding is unsupported by the language, remedial scheme, or legislative history of the Fair Housing Act. First, the language of Sections 3604 and 3612 shows that Congress intended, in enacting those sections, to provide a remedy only for persons who were directly subjected to discrimination in the purchase or rental of housing. When the remedial provisions of the Fair

<sup>1</sup> Contrary to the statutory language, the Seventh Circuit held that Congress had granted a cause of action, under Sections 3604 and 3612, to persons who are not bona fide purchasers or renters of housing. *Appendix 153, 155, 158*. The Court of Appeals further held that Congress could, consistent with the requirements of Article III, grant a cause of action to persons in the position of these plaintiffs. *Appendix 155, 158*. Both of these conclusions are erroneous. If this Court holds, as a matter of statutory construction, that Congress did not grant any right of action under Sections 3604 and 3612 to persons who are not direct victims of discrimination, it need not reach the Article III question. "The principle is old and deeply embedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *United States v. Five Gambling Devices*, 346 U.S. 441, 448 (1953). The Article III question is discussed at pp. 39-52, *infra*. Although the Seventh Circuit found it unnecessary to decide explicitly whether plaintiffs had stated a claim under Section 1982, that question must be addressed if this Court holds that Sections 3604 and 3612 create no cognizable claim in these circumstances.



Housing Act are construed together, they disclose a unitary scheme which rests on public policy considerations which are squarely inconsistent with the Seventh Circuit's view of Section 3612. Second, the legislative history provides no support for the view that Congress intended, in enacting these sections, to take the unusual step of subjecting potential defendants to lawsuits brought by random members of the general public. See *Willard v. City of Cambridge*, 85 Mass. 574 (3 Allen) (1862); Prosser, *Private Actions For Public Nuisance*, 52 Va.L.Rev. 997, 1015 (1966). Indeed, the legislative history does not show that Congress ever contemplated that actions might be brought under Section 3612 by persons who were not direct victims of discrimination in the purchase or rental of housing. Finally, Section 1982 does not grant any right of action to these plaintiffs. Consequently, these plaintiffs have failed to state a claim under Sections 1982, 3604 and 3612.

**A. Properly Construed, Sections 3604 and 3612 Do Not Protect The Generalized Rights Asserted By The Individual Plaintiffs Or The Village Of Bellwood.**

Section 3612 provides a jurisdictional basis for enforcing certain substantive rights granted by Section 3604 and three other sections of the Fair Housing Act.<sup>2</sup> Section 3604

<sup>2</sup> Section 3612 also creates jurisdiction to enforce substantive rights granted by Sections 3603, 3605, and 3606. Section 3603 clarifies certain rights contained in Section 3604. 42 U.S.C. § 3603. Section 3605 prohibits discrimination in financing arrangements, while Section 3606 prohibits discrimination in the provision of brokerage services. 42 U.S.C. §§ 3605, 3606. If this Court were to adopt plaintiffs' view that persons other than direct victims of discrimination have a right to sue under Sections 3604 and 3612, based on a generalized injury, the same conclusion would necessarily follow with respect to the remaining three sections which grant rights that may be enforced under Section 3612.

does not purport to create affirmative rights; that section simply declares that certain practices shall be unlawful. By enacting Section 3612, however, Congress apparently intended to establish that the right not to be subject to the practices proscribed in Section 3604 should be protected as a matter of affirmative right. Neither Section 3604 nor Section 3612 suggests, however, that Congress intended to create an enforceable right in persons other than those who were subjected to discrimination in a good faith attempt to purchase or rent housing. Moreover, neither Section 3604 nor Section 3612 creates any actionable right to be free from any practice apart from those specifically proscribed in Section 3604. There is no basis in the language of these sections for assuming that Congress intended to create the alleged rights upon which plaintiffs base their claim for relief.

None of the five subsections of Section 3604 purports to create an actionable right to live in an integrated society, and none of the subsections grants municipalities an actionable right to protect their housing markets. That Congress did not intend to grant any right of action to municipalities under Section 3612 is particularly clear from that section's title: "Enforcement by private persons." 42 U.S.C. § 3612. A municipal corporation is not a private person.<sup>3</sup>

<sup>3</sup> As Chief Justice Marshall said in *United States v. Fisher*, 1 U.S. 421, 423 (2 Cranch) (1805): "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." Inasmuch as the definitional section of the Fair Housing Act does not include governmental units within its definition of "person," it is doubtful that the Village of Bellwood is a "person" entitled to sue under Section 3612. 42 U.S.C. § 3602(d). Compare 42 U.S.C. § 2000e(a). Moreover, even if the Village of Bellwood is a "person" within the meaning of



The Seventh Circuit's decision, upholding plaintiffs' generalized claims of indirect injury, is not supported by the plain language of Sections 3604 and 3612. Moreover, it is inconsistent with a fundamental principle of statutory

(footnote continued)

the Act, it is certainly not a "private person." Municipalities are instrumentalities of government: "These corporations are bodies politic created to administer designated affairs in their respective areas. They exercise delegated powers of government and are usually regarded . . . as subordinate departments, or auxiliaries, or convenient instrumentalities of the state for the purpose of local or municipal rule." 1 E. McQuillin, *The Law of Municipal Corporations* §1.19 (3d ed. 1971). See 1 A. de Tocqueville, *Democracy in America* 62 (Bradley ed. 1945).

Congress obviously intended to limit the applicability of Section 3612 to suits by "private persons" because municipal corporations have traditionally been responsible for housing matters and, as instrumentalities of the state, they have alternative means for achieving fair housing objectives. See McQuillin, *supra*, § 1.74. In Illinois, the legislature has delegated broad powers to its political subdivisions to prohibit discrimination in housing. See Ill.Rev.Stats. ch. 24, § 11-11.1-1 (1977); *id.*, ch. 111, § 5742 (1977). Indeed, the Village of Bellwood has enacted a fair housing ordinance pursuant to this delegated authority. (A copy of that ordinance is attached hereto as *Petitioners' Additional Appendix*). Inasmuch as the sovereign has delegated this power to municipalities, it is difficult to see why they should need a cause of action under Section 3612 to promote their governmental objectives. Congress clearly recognized this when it enacted Section 3612 to provide for "Enforcement by private persons." It could be argued, of course, that a municipal corporation might be a "person aggrieved" within the meaning of Section 3610 and that it might consequently, be entitled to sue under that section. That question, however, is not before this Court. Moreover, even if a municipality were entitled to sue under Section 3610, it would not necessarily follow that it must be able to sue as a "private person" under Section 3612. Indeed, that fact would further underscore the significant differences between the remedial provisions of the two sections. See pp. 19-29, *infra*.

construction: that the sections of a statute must be construed "in connection with every other . . . section so as to produce a harmonious whole." 2A C. Sands, *Sutherland Statutory Construction* § 46.05, p. 56 (4th ed. 1973).<sup>4</sup> In this case, the Court of Appeals recognized that its construction of Section 3612 ignored the relationship of that section to Section 3610. Nonetheless, the Seventh Circuit brushed aside this long-standing principle by suggesting only that its construction of Section 3612 "may to some degree seem to offend a judicial penchant for consistency." *Appendix 162*.

When Sections 3610 and 3612 are read in concert, they demonstrate a comprehensive remedial scheme which is unambiguous in its public policy. Section 3610, which permits actions to be brought by some indirect victims of discrimination, requires compliance with important preliminary procedures before an action may be brought in federal court. Section 3612, on the other hand, creates immediate and unconditional jurisdiction in the federal courts for persons who, as purchasers and renters, are direct victims of discrimination.

Section 3610 establishes a well-considered procedure for protecting the rights of any "person aggrieved," expan-

<sup>4</sup> This principle of construction is firmly established in the cases of this Court. In *Cherokee Inter-marriage Cases*, 203 U.S. 76, 89 (1906), Chief Justice Fuller said that "the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by other parts of the act, and the words used may be qualified by their surroundings and connections." Justice Cardozo has also noted that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting). See also Frankfurter, *Some Reflections on The Reading Of Statutes*, 47 Colum.L.Rev. 527, 537-38 (1947).

sively defined in that section as "[a]ny person who claims to have been injured . . . or who believes that he will be irrevocably injured by a discriminatory housing practice." 42 U.S.C. § 3610(d). The Court had occasion to construe Section 3610 in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In *Trafficante*, this Court held that certain tenants of an apartment complex were "persons aggrieved," with standing to challenge their landlord's discriminatory rental practices, even though they were not themselves objects of discrimination, because those practices deprived them of the benefits of living in an integrated community. The Court held that "the words ['person aggrieved'] showed 'a congressional intention to define standing as broadly as is permitted by Article III. . . insofar as tenants of the same housing unit that is charged with discrimination are concerned.'" *Id.*, 209.

While Section 3610 provides for broad standing, it does not provide for immediate access to the federal courts. A putative plaintiff must first allow the Secretary of Housing and Urban Development an opportunity to eliminate the alleged discriminatory practice by informal means. 42 U.S.C. § 3610(a). Moreover, if state or local governments provide rights and remedies substantially equivalent to those provided by federal law, the Secretary must allow them an opportunity to resolve the dispute. *Id.*, § 3610(d). In either event, thirty days must be allowed for conciliation efforts before a suit may be brought. *Id.* Finally, no federal court action may ever be brought under Section 3610 if substantially equivalent judicial remedies are available at state law. *Id.*

Section 3610 reflects a strong commitment by Congress to the use of federal administrative remedies and the development of effective state and local remedies. In Section 3610, Congress placed primary emphasis on con-

ciliation, rather than litigation, to enforce the Fair Housing Act. At the threshold, "persons aggrieved" must avail themselves of the informal remedies provided by HUD. Moreover, by requiring exhaustion of state and local remedies, Congress recognized the important role that state and local officials have traditionally enjoyed in housing matters. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); 1 E. McQuillin, *The Law Of Municipal Corporations* § 1.74 (3d ed. 1971). Congress wished to take advantage of state and local concern by making primary resort to state and local authorities an integral part of the statutory scheme. In *Hunter v. Erickson*, 393 U.S. 385, 388-89 (1969) (footnotes omitted), this Court analyzed the purposes supporting this statutory exhaustion requirement:

The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws, and the 1866 Civil Rights Act . . . should be read together with the later statute on the same subject . . . so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves. . . . Unlike state or federal programs, the [municipal] ordinance brings local people together for conciliation and persuasion by and before a local tribunal. It is precisely this sort of very localized solution to which Congress meant to defer.

Given the magnitude of the problem of discrimination in housing, Congress wisely decided that our national housing goals could not be attained solely through federal court litigation, but that voluntary compliance and increased efforts by state and local officials were also necessary. In summary, the central purpose of Section 3610 is two-fold: (1) to effectuate the policies of the Fair Housing Act without costly litigation, and (2) to encourage the enactment and enforcement of state and local fair housing laws.

The remedial provisions of Section 3612 are different from those of Section 3610 in two important respects. First, in contrast to Section 3610's purposeful exhaustion



mechanism, Section 3612 provides immediate access to the federal courts. Second, the two sections use significantly different language to describe the persons within their protection. While Section 3610 grants a right of action to any "person aggrieved," the focus of Section 3612 is considerably more narrow: it provides only that certain enumerated rights "may be enforced by civil actions." 42 U.S.C. § 3612(a). In choosing not to use the broad language of Section 3610 in Section 3612, Congress had a more limited object in mind; namely, that Section 3612 would provide a remedy for only those persons who had been discriminated against while attempting to purchase or rent housing.<sup>5</sup>

The Seventh Circuit failed to consider whether the divergent language of these sections reflects different underlying policies. Instead, the court simply held that these plaintiffs had stated a claim under Section 3612 because this Court had previously held that tenants of an apartment complex had standing under Section 3610 to complain that they had lost the benefits of living in an integrated community. See *Trafficante, supra*, 208. The Seventh Circuit's holding ignores the presence in Section 3610 of the phrase "person aggrieved," which signifies

<sup>5</sup> Of the four sections which grant rights enforceable under Section 3612, the plaintiffs herein allege a violation of only Section 3604, which proscribes certain discriminatory practices in the "sale or rental" of housing. 42 U.S.C. § 3604. Because the individual plaintiffs were not bona fide homeseekers, they could not have been discriminated against in the sale or rental of housing. Most simply, plaintiffs' allegations of racial steering are an attempt to enforce the Section 3604 rights of others, which they believe to have been violated. As a matter of statutory construction, however, Section 3612 does not grant a right of action to persons whose Section 3604 rights have not been violated, even if those persons may have been injured in some generalized and attenuated sense by a violation of the Section 3604 rights of others.

the broadest standing constitutionally possible. That language is not contained in Section 3612.

In *Associates Industries v. Ickes*, 134 F.2d 694, 705 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), Judge Frank discussed the significance of the phrase "person aggrieved" in a slightly different context:

[The Supreme Court has] construed the "person aggrieved" review provision as a constitutionally valid statute authorizing a class of "persons aggrieved" to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. Although one threatened with financial loss through increased competition resulting from unlawful action of an official cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the "person aggrieved" statute gives the needed authority to do so to one who comes within that description.

In Judge Frank's view, the "person aggrieved" language is unique because it allows a class of persons to bring suit in circumstances where the nature of their injury would not otherwise permit them to do so.<sup>6</sup> Accord *E.E.O.C. v. Bailey Co.*, 563 F.2d 439, 454 (6th Cir. 1977),

<sup>6</sup> The phrase "person aggrieved" has traditionally been used to create an expansive right of access to the courts. *American Power & Light Co. v. S.E.C.*, 325 U.S. 385, 390-91 (1945); *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Scamwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 862-65 (D.C. Cir. 1970). Consequently, this language has a well-accepted meaning in American law. *Office of Communication of the United Church of Christ v. F.C.C.*, 359 F.2d 994, 1002 (D.C. Cir. 1966) (Burger, J.). When words with a long-established meaning are used in a statute, "they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, ..... U.S. ...., 98 S.Ct. 866, 871 (1978), quoting, *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911).

*cert. denied*, ..... U.S. ...., 98 S.Ct. 1468 (1978). Because this grant of standing is unique, it should not be implied in a statute that does not provide for it in its terms. Certainly, it should not be implied where, as here, Congress has specifically included that language in a companion section of the same act.

Congress's purpose in including the "person aggrieved" provision in Section 3610, but not in Section 3612, is clear. Given Section 3610's emphasis on voluntary compliance, conciliation, and local remedies, Congress clearly believed that the nation's fair housing goals would be well-served by allowing broad standing under that section. The remedies provided by Section 3612, however, are federal judicial remedies. Because of the cost and inconvenience involved in defending federal court litigation, Congress recognized the need for restricting immediate judicial access to persons whose rights had been violated. See pp. 29-34, *infra*. The Ninth Circuit has recognized that these differences in statutory coverage must be evaluated in light of the two sections' distinctive remedial schemes:

The Supreme Court has recently characterized its earlier interpretation of section 3610 in *Trafficante* as giving residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth v. Seldin*, *supra*, 422 U.S. at 513, 95 S.Ct. at 2212, 45 L.Ed.2d at 363. The narrower language of section 3612, on the other hand, precludes suit by such individuals. By permitting suit only to enforce certain enumerated rights, that section provides access to the courts only to those who are granted rights by the Act, namely, those who are the direct objects of the practices it makes unlawful. Section 3604 grants rights not to be discriminated against in the sale or rental of housing. . . . Although the complaint alleges that racial steering is a practice which violates section 3604, we conclude that only the

direct victims of such a practice have a cause of action under section 3612.

While . . . section [3610] provides a remedy for a broad spectrum of individuals aggrieved by discrimination, the judicial system is not the initial forum for relief and thus is protected from a potential excess of litigation. Section 3612 provides preferential access to judicial processes as necessary for those individuals who are the primary victims of the illegal acts of discrimination. Such persons are likely to suffer grave and immediate harm and judicial relief may be necessary for the full vindication of their rights.

*TOPIC v. Circle Realty*, 532 F.2d 1273, 1275-76 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976).<sup>7</sup>

<sup>7</sup> In *TOPIC*, *supra*, an association dedicated to open housing, and three of its members, alleged that certain real estate brokers had engaged in racial steering in violation of Section 3604. They brought suit under Section 3612. The individual plaintiffs were not actual homeseekers, and they had suffered no direct injury due to the alleged racial steering. Instead, they alleged that they had been injured indirectly by being "deprived of the important social and professional benefits of living in an integrated community." *Id.*, 1274. They sought to assure the justiciability of their claim by describing their alleged injury in the same words used by the plaintiffs in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). The Ninth Circuit held, however, that this Court's holding in *Trafficante* was inapposite because it applied only to cases brought under Section 3610, which created a remedial scheme entirely dissimilar in structure and purpose from that established by Section 3612.

The Seventh Circuit's decision herein directly conflicts with the Ninth Circuit's decision in *TOPIC*. Apart from their holdings, the cases are indistinguishable in all material respects. In both cases, persons who were not purchasers or renters of housing brought suit, under Section 3612, claiming that they had been denied the right to live in an integrated community or society. The Seventh Circuit recognized that the *TOPIC* decision was "not without some plausibility," but concluded that that case was wrongly decided. *Appendix 159*.



The Seventh Circuit's construction of Section 3612 precludes implementation of the policies which Congress sought to further by enacting Section 3610: "To accept [the] argument that sections 3610 and 3612 extend to identical classes of plaintiffs would destroy this statutory pattern, for the procedural prerequisites of section 3610 could then be avoided in every case." *TOPIC, supra*, 1276. Consequently, persons who are not purchasers or renters of housing must be remitted to their Section 3610 remedies. The Ninth Circuit's decision is well-grounded in an important practical consideration: the systematic circumvention of Section 3610 remedies will frustrate the policy goals underlying that section, without significantly advancing any competing interests, by encouraging the atrophy of both federal conciliation procedures and state and local remedies.<sup>8</sup> Systematic circumvention of administrative remedies is undesirable because it is likely to cause a "dislocation of the administrative scheme." L. Jaffe, *Judicial Control of Administrative Action* 452 (1965). See also Comment, *Exhaustion Of State Administrative Remedies In Section 1983 Cases*, 41 U.Chi.L.Rev. 537, 541 n.20 (1974). Moreover, the potential for serious harassment of innocent parties is greatly increased if the restraining influ-

<sup>8</sup> The *TOPIC* court's construction also conserves scarce judicial resources by limiting immediate judicial relief to direct victims of discrimination, thereby increasing the likelihood that timely judicial relief will be afforded to those persons. If an individual is denied the opportunity to purchase or lease a particular dwelling because of discrimination, he will need extraordinary relief to guarantee that the dwelling he seeks is not sold or leased before his claim can be heard. It was for this reason that Congress provided for expedited disposition of these cases. 42 U.S.C. § 3614. By limiting immediate access to the courts to good faith purchasers and renters, the *TOPIC* court's construction increases the likelihood that that relief will be available when necessary. The *TOPIC* court's construction thus furthers judicial economy as well as an important purpose of the Fair Housing Act.

uence of Section 3610 procedures is supplanted by immediate federal litigation in every case. If Section 3612 is construed to permit persons in the position of these plaintiffs to bring suit in federal court the policies underlying Section 3610 will be seriously undercut.

The Seventh Circuit also apparently believed that enforcement of the Fair Housing Act would be facilitated by permitting parties to assert the rights of others. That view is incorrect for two reasons. First, it is a fundamental principle<sup>9</sup> of American law that litigants do not have standing to assert the rights of third parties who may

<sup>9</sup> While Congress could supplant this general rule by enacting specific legislation, it has not done so in Section 3612. Where Congress has not specifically demonstrated its intention to overrule an established principle of the common law, statutes must be construed against the background of existing common law principles. See *Carey v. Phipps*, ..... U.S. ...., 98 S.Ct. 1042 (1978); 2A C. Sands, *Sutherland Statutory Construction* § 50.02 (4th ed. 1973). Professor Wellington has noted that, "The court should assume responsibility by imposing on the legislature a clear statement rule: to depart from an established principle, the legislature must speak plainly." Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes On Adjudication*, 83 Yale L.J. 221, 264 (1973) (emphasis in original). Following this principle of statutory construction, the Court has held, for instance, that the Civil Rights Acts must be construed against the background of common law tort liability. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). While the plain language of 42 U.S.C. § 1983 would seem to impose strict liability on state and local officials, the Court has held that the common law doctrine of official immunity applies in Section 1983 actions because Congress has not expressly said otherwise. *Stump v. Sparkman*, ..... U.S. ...., 98 S.Ct. 1099 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975); *Pierson v. Ray*, 386 U.S. 547 (1967). The same principle of construction compels the conclusion in this case that Section 3612 should not be construed to provide a cause of action for persons who seek to vindicate the rights of others.



have been injured by unlawful conduct. *Alderman v. United States*, 394 U.S. 176 (1969). See also *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953); *Tileston v. Ullman*, 318 U.S. 44 (1943). Even in cases involving fundamental constitutional rights, such as those protected by the Fourth Amendment, this Court has followed the principle that persons may not assert the rights of others: "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman, supra*, 171-72 (1969). The need for enforcing the policy of the Fair Housing Act cannot constitute a more compelling justification for third-party standing than can the need for enforcing fundamental constitutional guarantees. Moreover, while certain goals of the Fair Housing Act might be furthered by third-party standing, equally important goals will certainly be frustrated. See pp. 20-21, 24-27, *supra*.

Section 3612 must be construed as a part of the overall scheme established by the Fair Housing Act's two private enforcement provisions. On the one hand, Section 3610 grants standing to any "person aggrieved." That language creates a special basis for standing, which is as broad as constitutionally permissible. Section 3610, however, also requires exhaustion of federal conciliation procedures as well as viable state and local remedies. The purposes of these prerequisites are to facilitate enforcement of the Act without federal court litigation, and to encourage state and local participation in the attainment of national fair housing goals. Charges raised by per-

sons who are not themselves direct victims of discrimination present the ideal circumstances for informal conciliation by state and federal officials. Section 3612, on the other hand, permits immediate access to the coercive remedies of the courts. Unlike Section 3610, however, Section 3612 does not purport to grant relief to any "person aggrieved." Consequently, Section 3612 must be construed as providing a cause of action only to persons who have been directly discriminated against in the purchase or rental of housing. This construction preserves the viability of Section 3610, and it imputes to Congress the rationality which legislative bodies must be presumed to possess. No other construction is consistent with the remedial scheme established by Congress.

**B. The Legislative History Of The Fair Housing Act Does Not Support The Seventh Circuit's Construction Of Sections 3604 And 3612.**

The Court of Appeals was correct when it recognized that its construction of Section 3612 "may to some degree seem to offend a judicial penchant for consistency [in that it implies] that Congress has, in the same act, established an administrative remedy and authorized plaintiffs, at their discretion to bypass it." *Appendix* 162. By relying on certain isolated remarks in the Act's legislative history, however, the Court of Appeals persisted in its view that the two sections are coextensive. *Appendix* 161-63. The Seventh Circuit's reliance on these remarks is misplaced for two reasons. First, the remarks are not themselves convincing support for the court's construction. Second, the legislative history contains other materials

which are at least equally, if not more persuasive in support of the contrary view.<sup>10</sup>

The Seventh Circuit was apparently influenced by certain statements of Mr. Celler and Mr. Ford, both of whom described the remedial provisions of the two sections as alternatives. *Appendix* 161-62. Those statements are partially correct, of course, because the two sections do provide alternative remedies for persons who have been discriminated against in the purchase or rental of housing. On the other hand, the legislative history contains no evidence that any legislator ever suggested that persons other than purchasers and renters might be entitled to sue under the Act. If anything, the Senate debate concerning the "bona fide offer" amendment to Section 3604 suggests that Congress had no intention of permitting such suits by indirect victims of housing discrimination. See pp. 31-34, *infra*. The authority of the isolated remarks quoted by the Seventh Circuit is therefore suspect because those remarks were undoubtedly based on the assumption that only purchasers and renters could sue under the Act. That assumption is exactly contrary to the court's use of those remarks.

In some respects, of course, the legislative history of the Fair Housing Act is admittedly incomplete, as Justice

<sup>10</sup> Given the nature of the legislative process, it is hardly surprising that legislative history frequently supports contradictory constructions of an act. See, e.g., *S.E.C. v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935) (L. Hand, J.). When the legislative history is ambiguous, courts "must look primarily to the statutes themselves to find the legislative intent." *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971). In this case, the statute itself clearly supports defendants' construction. See pp. 16-29, *supra*.

Douglas suggested when he observed, in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972), that "[t]he legislative history of the Act is not too helpful." In at least one respect, however, the legislative history is helpful: it demonstrates an abiding concern that the Act should not be used as an engine of harassment.

During the Senate's consideration of Section 3604, Senator Allott proposed an amendment to the section, inserting the phrase "after the making of a bona fide offer." 114 Cong.Rec. 5515 (1968). The debate concerning that amendment, which was ultimately included in the final version of Section 3604, shows that Congress was concerned with protecting potential defendants from harassment as well as providing effective relief for purchasers and renters whose rights were affected by discrimination. The colloquy between Senator Mondale, the draftsman of the Act, and Senator Allott, the proponent of the amendment, is instructive:

Mr. Allott. Mr. President, this amendment . . . would make the penalty provisions of the proposed legislation applicable only where there is a refusal to sell or rent after a bona fide offer has been made.

In other words, I want to negate any possibility of undue harassment or pressure upon a seller or lessor. Upon the basis of sheer equity alone, a party should not be placed in jeopardy or found guilty of a violation of this act merely for refusing to sell or rent when the person who approached him was not in a position to make or did not make a bona fide offer.

. . . . .

Mr. Mondale. As I understand the intent of the amendment, . . . it is this: When a person really wants to rent a particular leasehold or when he wants to buy

a particular piece of property, he is clearly within the protection of this measure. But when the offer is in effect a phony one, when he has no intention, when it is not a good safe offer, because he is on a lark or whatever, when it is a contrived sort of situation with which he would never go through, he would not be protected. Is that the distinction that the Senator seeks to make?

Mr. Allott. The Senator has stated it very clearly and plainly. That is the distinction that is sought to be made.

\* \* \* \* \*

Mr. Mondale. I am also correct in my understanding that this determination can be made on the basis of the facts in each instance, and it has no relationship to underlying statute of fraud laws in particular States?

Mr. Allott. No, I do not believe it would necessarily have to go so far as a binding contract. But if it was not in fact a bona fide offer, with the capability of going through with the contract, then the proposed seller or lessor, would not be in a bind by reason of it. So I believe that this amendment would clear up a necessary feature.

Mr. Mondale. When the Senator uses the word "capability," he means that the offeror had no intention of going through the bargain, that it was not a bona fide good faith offer to rent or buy?

Mr. Allott. That is correct. And I believe the words "bona fide" are so well established throughout the body of the law that we need not define them further.

Mr. Mondale. We have no objection.

*Id.*

Immediately following this colloquy, Senator Scott concurred in the amendment stating that "We should fore-

close any area in which there might be an opportunity for agitation for agitation's sake, or harassment, or general orneriness [because] this is an area in which there might be a totally phony or false approach, without any intention to consummate a sale." *Id.*

Senator Cooper also approved of the amendment because, "[w]ithout its adoption, numerous situations might arise in which a renter or an owner could be prosecuted and could be caused all kinds of trouble, when the person offering to rent or to buy had no intention of renting or buying and had no capacity to do so." *Id.* Senator Cooper further stated that:

The bill before us would protect a person who is discriminated against. It should also protect owners who are giving up some of the privileges they have held throughout the years. They should not be subjected to actions by capricious non-bona-fide offerors.

*Id.*

The Senate's discussion of the Allott Amendment shows that Congress wished to avoid the significant potential for abuse which lay in the powerful remedy provided by Sections 3604 and 3612. Congress also recognized the need for protecting potential defendants from contrived litigation.<sup>11</sup> Because of that possibility, Congress consciously

<sup>11</sup> Shortly after the enactment of the Fair Housing Act, a commentator assessed the meaning of the legislative history: "The civil rights acts by their very nature deal with personal relations. Because of the possibilities of animosity, safeguards against use of the statutory causes of action solely for purposes of harassment or nuisance are desirable. . . . Title VIII attacks the problems. . . . First, if the complaint is filed with the Secretary, he may refuse to act on it if, in his judgment, it is without merit. The second and more important device is the bona fide purchaser rule. If the complainant would not have been ready, willing, and able to per-



limited the circumstances in which an action could be brought under these sections. The Seventh Circuit's expansive construction of Sections 3604 and 3612 is simply inconsistent with the concerns which moved Congress to insert the "bona fide offer" requirement in Section 3604. The Seventh Circuit's construction, which invests the public at large with a roving commission to bring suits under Section 3612, is inconsistent with the reasoning of the Allott Amendment debates, which constitute the only relevant legislative history on the subject. The decision of the Court of Appeals is contrary to the legislative history.<sup>12</sup>

(footnote continued)

form the contract, had his offer been accepted, he cannot bring an action under Title VIII." Note, *Jones v. Mayer: The Thirteenth Amendment And The Federal Anti-Discrimination Laws*, 69 Colum. L.Rev. 1019, 1053 (1969) (footnotes omitted). The same commentator also noted the problems of harassment by organizational plaintiffs: "The bona fide purchaser restriction . . . would probably forbid organizational suits per se, unless the organization could find or was willing to finance a bona fide purchaser. . . . The dangers of harassment . . . exist in terms of organizational plaintiffs to at least the same degree as individual plaintiffs. Though organizations may find temporary avenues in Section 1982, it is likely either that standing will not be extended to organizational plaintiffs, or that Section 1982 will be interpreted to allow standing only to the same extent as Title VIII, in order to avoid gaps for harassment." *Id.*, 1054. Analytically, there is no difference, of course, between organizational plaintiffs and those who base their right to sue on an alleged infringement of their generalized right to live in an integrated society. The same potential for harassment exists in both cases.

<sup>12</sup> The Court of Appeals was also persuaded that plaintiffs had standing because of what it believed to be HUD's interpretation of the Act. *Appendix* 162. The court's reliance on 24 C.F.R. § 105.16 is misplaced, however, because that regulation concerns only Section 3610 procedures; it does not purport to construe Section 3612. Even if that regulation did purport to construe Section 3612, however, the agency's construction of the statute could not diminish this Court's

(footnote continued)

### C. The Individual Plaintiffs And The Village Of Bellwood Have Failed To State A Claim Under Section 1982.

Section 1982 provides that all citizens of the United States "shall have the same right . . . as white citizens . . . to inherit, purchase, sell, hold, and convey real . . . property." 42 U.S.C. § 1982. The individual plaintiffs have alleged that defendants violated their rights under Section 1982 by depriving them "of the social and professional benefits of living in an integrated society." *Appendix* 6, 99. Likewise, the Village of Bellwood has alleged that defendants violated its rights under Section 1982 by causing its "housing market [to be] wrongfully and illegally manipulated to the economic and social detriment of the citizens of such village." *Appendix* 6, 99.

The language of Section 1982 provides no basis for holding that Congress intended, in enacting that section, to create a cause of action to protect the generalized rights

(footnote continued)

responsibility to interpret the laws. Moreover, as this Court has emphasized, an administrative interpretation of a statute must be thoroughly reasoned and possess some "power to persuade" to be worthy of judicial deference. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). Accord *S.E.C. v. Sloan*, ..... U.S. ...., 98 S.Ct. 1702 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). No such reasoned interpretation has been undertaken by HUD. More important, however, an administrative interpretation of Section 3612 would have little value because the questions raised herein are not questions within the expertise of the agency. See *McKart v. United States*, 395 U.S. 185 (1969). The determination of standing is a uniquely judicial task, in which this Court may not "abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber v. Allen*, 396 U.S. 168, 193 (1969).

asserted by these plaintiffs. First, the rights granted by Section 1982 are wholly personal in nature: "In order for a plaintiff to predicate an action on [Section 1982], he must have been deprived of a right which, under similar circumstances, would have been accorded to a person of a different race." *Schetter v. Heim*, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969). In this case, plaintiffs' claim of injury is alleged to rest on a deprivation of the Section 1982 rights of others. It is undisputed that these plaintiffs were not themselves denied the right to "purchase," "sell," or "hold" real property. See *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115-16 (D. Mass. 1972).

An analogous situation was presented in *Warth v. Seldin*, 422 U.S. 490 (1975). In *Warth*, one group of plaintiffs, who challenged a suburban zoning ordinance on behalf of the suburb's residents, also alleged that they had been denied the benefits of living in an integrated community. Although relying on *Trafficante, supra*, the *Warth* plaintiffs did not bring their action under the Fair Housing Act. Instead, they sued under Sections 1981, 1982, and 1983 of Title 42, United States Code. The Court rejected plaintiffs' claims, noting that these sections did not grant any broad statutory right such as that provided by Section 3610 of the Fair Housing Act: "[T]heir complaint is that they have been harmed indirectly by the exclusion of others. This is an attempt to raise putative rights of third parties, and none of the exceptions that allow such claims is present here." *Warth, supra*, 514 (footnote omitted). See also *Cornelius v. City of Parma*, 374 F. Supp. 730, 742-43 (N.D. Ohio 1974), *remanded without opinion*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).

Second, these plaintiffs seek to enlarge the doctrinal scope of Section 1982 beyond the bounds which have been set in this Court's earlier decisions. In *Hunter v. Erick-*

*son*, 393 U.S. 385, 388 (1969), the Court held that Section 1982 should not be expansively construed so as to defeat the more detailed provisions of the Fair Housing Act of 1968, particularly with respect to its policy of preserving and deferring to local fair housing legislation. Likewise, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-14 (1968) (footnotes omitted), the Court emphasized that Section 1982 is a limited statute, not an omnibus fair housing law:

Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 . . . the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin. It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. It does not prohibit advertising or other representations that indicate discriminatory preferences. It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services. It does not empower a federal administrative agency to assist aggrieved parties. It makes no provision for intervention by the Attorney General. And, although it can be enforced by injunction, it contains no provision expressly authorizing a federal court to order the payment of damages.

The expansion of Section 1982 necessary to accommodate plaintiffs' claims would certainly transform that section into an omnibus fair housing law, supplanting the well-considered remedial scheme established by the Fair Housing Act of 1968. That transformation of Section 1982 would contradict this Court's prior holding that the two



statutes should be construed in concert, to give effect to the more detailed provisions of the later statute.<sup>13</sup> See *Hunter, supra*, 388. Neither the Village of Bellwood nor the individual plaintiffs have stated an actionable claim under Section 1982.

The decision of the Court of Appeals for the Seventh Circuit has no basis in the language of Sections 1982, 3604, and 3612 of Title 42, United States Code. That decision is also inconsistent with the public policy, remedial structure, and legislative history of the Fair Housing Act. For these reasons, the judgment of the Court of Appeals should be reversed.

<sup>13</sup> Recognition of plaintiffs' claims requires two significant expansions of Section 1982, as to both the standing of persons who are not direct victims of discrimination and the scope of the substantive rights cognizable under this section. There is no basis in the language of Section 1982 for either of these assumptions, and that basis may not be supplied by statutory construction. *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Justice Frankfurter has succinctly stated this principle: "As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation." Frankfurter, *Some Reflections On the Reading Of Statutes*, 47 Colum.L.Rev. 527, 533 (1947). The judicial revision of Section 1982 requested by these plaintiffs is simply inconsistent with this Court's decision in *Hunter v. Erickson*, 393 U.S. 385 (1969).

## II.

### **PLAINTIFFS LACK STANDING TO SUE UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION BECAUSE THE INJURY THEY ALLEGE IS TOO GENERALIZED TO MEET CONSTITUTIONAL REQUIREMENTS, AND IT IS RELATED TO DEFENDANTS' ALLEGED ACTIVITIES ONLY IN THE MOST ATTENUATED SENSE.**

The purpose of Congress in enacting the Fair Housing Act of 1968 was "to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (emphasis added). Foremost among constitutional limitations is the "case or controversy" requirement imposed by Article III. U.S. Const. Art. III. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976).

A central component of the case or controversy limitation is the concept of standing to sue: the requirement that a party possess a sufficient stake in the outcome of a lawsuit "to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (emphasis in original).<sup>14</sup>

<sup>14</sup> In addition to its constitutional dimension, the standing doctrine reflects a judicial concern for "the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This judicial concern manifests itself in the so-called prudential limitations on the exercise of federal court jurisdiction which, although "closely related" to the constitutional case or controversy requirement, are "essentially matters of judicial

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In exercising its legislative power, Congress may enact laws which create legal rights unknown at common law. At the same time, however, the enforcement of such rights in the federal courts remains subject to constitutional standing requirements. Even if this Court should construe Section 3612 as granting a cause of action to persons who are not prospective purchasers or renters of housing, which it does not, the Court must still determine whether these plaintiffs have standing, in a constitutional sense, to maintain this action. This Court's prior decisions show that these plaintiffs' allegations are insufficient to meet the requirements embodied in Article III. Because the Seventh Circuit incorrectly held that these plaintiffs had met the requirements of Article III, its decision must be reversed.

**A. Because Plaintiffs Lack A Sufficiently Concrete And Personal Stake In The Outcome Of This Lawsuit, They Have No Standing To Sue.**

The constitutional standing requirement is two-fold. First, a plaintiff must demonstrate that he has personally suffered a concrete injury, or that he will suffer such an injury unless judicial relief is secured. *Association of*

(footnote continued)

self-governance." *Id.*, 500. See S. Thio, *Locus Standi and Judicial Review* 3 (1971); 1 A. de Tocqueville, *Democracy In America* 106-07 (Bradley ed. 1945).

This Court has noted that the standing doctrine "has become a blend of constitutional requirements and policy considerations," *Flast v. Cohen*, 392 U.S. 83, 97 (1968), and that the Court's self-imposed prudential limitations are "not always clearly distinguished from the constitutional limitation." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). Because the constitutional and prudential strands of the standing requirement are so interrelated, this brief will address both aspects of the standing doctrine together.

*Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). Second, a plaintiff must demonstrate a plausible causal connection between the alleged injury and the defendant's activities so that the relief he seeks will adequately redress the injury that he has suffered. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976); *Warth v. Seldin*, 422 U.S. 490, 505 (1975); *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973). A plaintiff who is unable to satisfy both of these requirements does not possess that personal and substantial stake in the outcome of the lawsuit necessary to confer standing. The Seventh Circuit's decision is inconsistent with the limitations of Article III because the injury which these plaintiffs assert is merely a generalized injury, and it is causally related to defendants' alleged activities only in the most attenuated sense. Plaintiffs' allegations, even if proved to be true, would be constitutionally insufficient to establish a case or controversy.

The individual plaintiffs alleged in their complaint that they had suffered an injury because defendants' alleged racial steering of homeseekers "deprived [plaintiffs] of the social and professional benefits of living in an integrated society." *Appendix* 6, 99.<sup>15</sup> The Village of Bellwood also alleged that it had been injured because the alleged practice of racial steering had caused "the housing market in [that] village [to be] wrongfully and illegally

<sup>15</sup> Initially, the individual plaintiffs also alleged that they were "denied their right to select housing without regard to race." *Appendix* 6, 99. During discovery, however, the individual plaintiffs admitted that they had not been injured in this manner because they had acted only as testers in the investigatory stage of this litigation, and that they never had any intention of purchasing a home. *Appendix* 27, 32, 116, 121. Moreover, at the time that summary judgment was granted, plaintiffs had failed to support their generalized allegations by identifying any bona fide homeseeker whom they believed to have been injured through racial steering. *Appendix* 28, 117.

manipulated to the economic and social detriment of the citizens of [the] Village." *Appendix* 6, 99. The complaint clearly shows that the Village's claim rests on an assumption, unsupported in law, that it may sue derivatively to vindicate the rights of its residents. Contrary to the conclusion reached by the Court of Appeals (*Appendix* 156), the basis of the Village's claim is merely derivative, and it is virtually identical to those of the individual plaintiffs; the justiciability of those claims under Article III must stand or fall together.<sup>16</sup>

In determining whether a plaintiff has satisfied constitutional standing requirements, a court must first determine whether the plaintiff has sustained an injury in fact. A putative plaintiff must demonstrate that he has personally suffered an injury that is actual, particular, and concrete, rather than one that is merely abstract. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Unless a plaintiff has suffered a sufficient injury, he lacks the personal stake in the outcome of the lawsuit necessary to support a case or controversy. "Concrete injury . . . adds the essential dimension of specificity to the dispute by requiring that

<sup>16</sup> While the language of the complaint unequivocally demonstrates the merely derivative nature of the injury alleged by the Village, the Seventh Circuit generously construed the Village's complaint as alleging the existence of a particularized injury to the Village itself, as a governmental unit. The Seventh Circuit construed the complaint as suggesting that racial steering could result in "unnaturally rapid population turnovers," which could in turn adversely affect the municipal tax base as well as augment unnamed municipal problems requiring additional revenues. *Appendix* 156. Assuming that the complaint could properly be construed in that manner, however, the Village still lacks standing to sue in the circumstances of this case because of the attenuated nature of the causal connection between the Village's alleged injury and defendants' alleged activities. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976). See pp. 46-50, *infra*.

the complaining party have suffered a particular injury caused by the action challenged as unlawful." *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 220-21 (1974). Consequently, an injury shared in common by all members of the public is usually insufficient to confer standing: "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . normally does not warrant exercise of jurisdiction." *Warth, supra*, 499.

The claim asserted by the individual plaintiffs—that they have been denied the benefits of living in an integrated society—is precisely the type of speculative and generalized injury which this Court has previously found to be beyond the ken of Article III. The Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), does not create an exception to that principle.<sup>17</sup>

In *Trafficante*, the plaintiffs were residents of a single apartment complex, which they characterized as a "community;" they complained that their landlord had denied them the benefits of interracial association by discriminating against prospective tenants on the basis of race. While the Court held that those plaintiffs had standing to sue, within the meaning of Article III, the situation of the plaintiffs in this case is not analogous. These plaintiffs are not residents of an apartment complex; they are not challenging the practices of a single landlord; and they are not

<sup>17</sup> In *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), the Ninth Circuit held that Section 3612 did not grant a right to sue in circumstances almost identical to those presented herein. The court also noted, however, that the plaintiffs therein might not have standing in a constitutional sense because, unlike the plaintiffs in *Trafficante*, they were not residents of a single apartment complex, and the relationship between defendants' conduct and the claimed injury "may be so attenuated as to negate the existence of any injury in fact." *TOPIC, supra*, 1275.



suings to protect their right to live in an integrated "community." On the contrary, these plaintiffs complain that they have been denied the right to live in an integrated society. It is difficult to conceive of an injury more generalized in character. Indeed, if plaintiffs' assertion is correct, and they have been denied the benefits of interracial associations, it is the result of numerous social, economic and historical factors, which are beyond the control of these defendants. More important, the injury that they allege must, by definition, be shared by the public at large. In that important respect, it is unlike the injury alleged by the plaintiffs in *Trafficante*, which was shared only by the residents of a single apartment complex. The plaintiffs in this case have suffered no particularized injury which would entitle them to sue. See, e.g., *Schlesinger, supra*; *Warth, supra*.

Plaintiffs' allegations may raise legal and social questions which are significant in the abstract, but the abstract significance of those questions cannot assure standing to sue because that question "focuses on the party," not on the substantive issues sought to be raised in the litigation. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).<sup>18</sup> The Court has

<sup>18</sup> While these plaintiffs lack standing, other plaintiffs—who have a particularized interest—would have standing to challenge defendants' alleged practices. The denial of standing to the plaintiffs herein will simply recognize that there are better plaintiffs than those currently before the Court; it will not implicate the merits of the abstract claim which these plaintiffs seek to adjudicate. Strictly speaking, however, the existence of other plaintiffs is irrelevant to the standing question. See *Schlesinger, supra*, 227. While the present plaintiffs cannot meet the requirements of Article III, and thus lack standing under Section 3612, they are not without a remedy. Presumably, they will be able to pursue their federal administrative remedies under Section 3610, as well as those remedies provided by the Village of Bellwood itself. See *Petitioners' Additional Appendix*.

frequently recognized that an abstract injury, even when it implicates cherished values, will not give rise to a case or controversy.

In limiting the jurisdiction of the federal courts to actual cases and controversies, the framers of Article III determined that alleged illegality must be adjudicated by persons whose particularized interests are directly put at issue. For instance, a citizen has a justifiable interest in the proper administration of justice in his community, but the Court has often held that that interest will not, by itself, support a challenge to unlawful practices in the administration of justice. *O'Shea v. Littleton*, 414 U.S. 488 (1974). See also *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

In another context, the Court has said that:

In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute "a case or controversy" appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

*Schlesinger, supra*, 226-27 (footnote omitted.) The Court's analysis is equally applicable to statutory provisions.

A citizen's generalized interest in living in an integrated community is significant, just as his interest in living in a community free from judicial impropriety is important. In both cases, however, Article III requires that the vindication of these generalized interests be undertaken by persons whose particularized interests are also put at issue. See also *Sierra Club v. Morton*, 405 U.S. 727 (1972). Just as criminal defendants play an important role in our system of constitutional government by vindicating the

community's generalized interest in the impartial administration of justice, so must we depend on persons who are particularly affected by discrimination to vindicate our generalized interest in living in an integrated society.

The second standing requirement under Article III is that the nature of the plaintiffs' alleged injury be such as to entitle him to an opportunity to prove the existence of a plausible causal connection, between that injury and the defendant's alleged activities, sufficient to assure that the relief sought will adequately redress the injury sustained. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). This requirement reflects a concern for several factors including concreteness of injury, the proper role of the judiciary, and the efficient allocation of judicial resources. The causation requirement is basic: a plaintiff must demonstrate that the relief which he seeks would actually benefit him by redressing the injury from which he allegedly suffers. If the prospective relief will not benefit the plaintiff, he cannot be said "to stand to profit in some personal interest" by the court's decision. *Id.*, 39. In that event, the exercise of judicial power is "gratuitous and thus inconsistent with the Art. III limitation." *Id.*, 38. In short, "the plaintiff's stake in a controversy must insure that exercise of the court's remedial powers is both necessary and sufficient to give him relief." *Singleton v. Wulff*, 428 U.S. 106, 124 n.3 (1976) (Powell, J., concurring in part and dissenting in part.)

The Court has emphasized the constitutional importance of the causation requirement. In *Warth v. Seldin*, 422 U.S. 490 (1975), four groups of plaintiffs challenged a suburban zoning ordinance, claiming that the ordinance effectively excluded persons of low and moderate income from living in the town. One group of plaintiffs consisted of low and moderate income persons, who claimed that they had been

unsuccessful in finding housing that they could afford. In determining whether these plaintiffs had standing, the Court made three assumptions: (1) that the ordinance "had the purpose and effect of excluding persons of low and moderate income," *id.*, 502; (2) that the ordinance and its enforcement "would be adjudged violative of the constitutional and statutory rights of the persons excluded," *id.*; and (3) that these practices had "contributed, perhaps substantially, to the cost of housing in [the suburb]," *id.*, 504. These assumptions, together with the plaintiffs' allegations that they had been excluded by the ordinance, were insufficient to persuade the Court that the plaintiffs' "inability to locate suitable housing . . . reasonably [could] be said to have resulted, in any concretely demonstrable way, from [defendants'] alleged constitutional and statutory infractions." *Id.*, 504.

As here, the injury alleged in *Warth* could not have followed from the defendants' alleged practices. Given the relevant constellation of material facts, the causal connection was so implausible that plaintiffs could not, consistent with Article III, be given an opportunity to prove it. While apparent indirectness of injury does not automatically preclude standing, the Court noted in *Warth* that indirectness "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Id.*, 505. In *Warth*, the Court held that the plaintiffs lacked standing because their inability to find suitably low priced housing resulted from "the economics of the area housing market," rather than from the acts of the defendants. *Id.*, 506. Consequently, the facts alleged "fail[ed] to support an actionable causal relationship between [the town's] zoning practices and [plaintiffs'] asserted injury." *Id.*, 507.

The Court also emphasized the causation requirement in *Simon, supra*, in which the plaintiffs challenged an Internal Revenue Service ruling which affected the tax-exempt status of private hospitals and, they asserted, thereby encouraged such hospitals to change their policies concerning indigent patients. The plaintiffs further alleged either that they had been denied free hospital care or, alternatively, that they represented other persons who had been denied such care. The Court accepted the proposition that the revenue ruling "encourages a hospital to provide fewer services to indigents than it might have under the previous policy" (*id.*, 42 n.23), but held that plaintiffs lacked standing because the injury alleged could not fairly be attributed to the revenue ruling itself:

It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.

It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.

*Id.*, 42-43. The possibility that some hospitals, in the absence of the new revenue ruling, would have provided more free care in order to maintain tax-exempt status was "speculative at best." *Id.*, 43.

In the present case, the causal relationship between the individual plaintiffs' injury—being denied the right to live in an integrated society—and defendants' alleged discriminatory practices is also "speculative at best." The causal

connection between the Village of Bellwood's alleged injury and defendants' alleged activities is equally attenuated and speculative. Residential housing patterns are determined by a complex mixture of numerous economic, social and historical factors. In *Warth*, the Court recognized the primacy of economic factors in this area, holding that the plaintiffs lacked standing because the mere removal of an exclusionary zoning ordinance could not insure the availability of low and moderate income housing. *Id.*, 506-07. Similarly, there is no reasonable basis for argument in the present case that the activities of two real estate firms are the necessary and sufficient cause of the macrosocial injuries alleged by both the individual plaintiffs and the Village of Bellwood.<sup>19</sup>

The individual plaintiffs have alleged an extremely generalized injury shared by a large group of persons. Moreover, the causal relationship between the injuries alleged by both the individuals and the Village, and defendants' alleged statutory violation, is so insubstantial that the po-

<sup>19</sup> See also *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150 (D.C. Cir. 1977), *cert. denied*, ..... U.S. ...., 98 S.Ct. 1533 (1978) (private travel agents lacked standing to challenge tax treatment of travel-related income of certain tax-exempt organizations; in light of the variety of factors influencing the travel programs of such organizations, plaintiffs did not demonstrate "that they would reap any tangible benefit if the court were to order the relief sought"); *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 459 (9th Cir. 1977) (plaintiffs lacked standing under Article III: "We cannot ignore the reality that the consumers' costs of energy are far more attributable to national and international forces of supply and demand than they are to the Secretary's actions and omissions"); *Mulqueeny v. National Commission On the Observance of International Women's Year*, 549 F.2d 1115, 1121-22 (7th Cir. 1977) (plaintiffs lacked standing to challenge lobbying of defendant Commission: court notes that effect of lobbying is "wholly conjectural"); *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976); *Evans v. Lynn*, 537 F.2d 571 (2d Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 1066 (1977).



tential effect of the relief sought, in redressing that injury, is merely speculative. These plaintiffs have failed to allege a concrete interest sufficient to satisfy the case or controversy limitation of Article III.

**B. These Plaintiffs Do Not Have Standing Under This Court's Decision In *Trafficante*.**

The Seventh Circuit erroneously construed this Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), in holding that the plaintiffs herein had standing to sue in the circumstances of this case. While acknowledging that this Court's decision in *Trafficante* was not technically controlling, the Court of Appeals found that it stood for the broad proposition that an allegation of injury to a citizen's generalized interest in living in an integrated society would categorically assure justiciability. The court noted that the complaint in this case contained "virtually identical allegations." *Appendix* 155. However, this Court's holding in *Trafficante* was considerably more narrow: the Court held only that a group of tenants, who complained that their landlord's rental practices deprived them of the benefits of living in an integrated community, had alleged a sufficiently particularized injury to meet the requirements of Article III. The limited nature of the Court's holding is underscored by the separate concurrence of Justice White, joined by Justice Blackmun and Justice Powell, who said that he "would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case." *Id.*, 212 (White, J., concurring).

The facts of *Trafficante* are distinguishable from the present case in two important respects. First, the injury alleged in *Trafficante* is wholly distinguishable from the injury alleged by these plaintiffs. A tenant's interest in living in an integrated apartment complex is not constitutionally analogous to a citizen's interest in living in an integrated society because the latter is necessarily less

particularized and more diluted. The injury alleged in the present case is also more generalized, inasmuch as it is shared by every person residing in a large metropolitan area of our society.

The second distinction between this case and *Trafficante* is closely related to the first: the causal connection between defendants' conduct and plaintiffs' alleged injury is significantly more obscure in the present case. The uncertain influence of defendants' alleged activities on metropolitan residential patterns bears little resemblance to the control that a landlord necessarily maintains over the residential patterns of an apartment complex. An apartment complex is an artificial and controlled environment in which a landlord's discriminatory practices may be both the necessary and sufficient causes of a tenant's loss of the opportunity to live in an integrated community. By contrast, many independent economic and social forces are implicated when the focus is shifted to a larger community. Therefore, the causal relationship between the alleged conduct of defendants and the alleged injuries, of both the individual plaintiffs and the Village of Bellwood, is substantially more attenuated than the causation recognized in *Trafficante*.

The Court's analysis in *Warth, supra*, is also instructive in distinguishing the present case from *Trafficante*. In *Warth*, the Court held that a particular group of plaintiffs lacked standing to challenge a municipality's exclusionary zoning ordinance because the nature of the causal connection between their alleged injury and the defendants' alleged activities was so uncertain that they could not, consistent with Article III, be given an opportunity to attempt to prove it. Judicial invalidation of the ordinance could not result in the increased availability of low and moderate income housing. The Court distinguished many lower court decisions, in which they had found standing to challenge zoning restrictions, on the ground that plaintiffs in those

cases had "challenged zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents." *Warth*, *supra*, 507. In those cases, consequently, the relief requested would undoubtedly redress a very real and concrete injury. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Likewise, in *Trafficante*, there was no dispute that the Court could grant effective relief because the causal relationship between the plaintiffs' alleged injury and their landlord's alleged activities was certain. The facts of the present case, however, are analogous to those of *Warth*, not *Trafficante*.

The decision of the Court of Appeals, which allows suits by natural persons and municipalities, who have no particularized interest and can demonstrate only the most attenuated causation, is inconsistent with the limitations imposed on the federal courts by Article III. Because respondents lack standing to sue in these circumstances, the decision of the Court of Appeals must be reversed.

### CONCLUSION

For all of the reasons stated herein, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: 27 July 1978

## APPENDIX

## PETITIONERS' ADDITIONAL APPENDIX

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### ORDINANCE NO. 75-8

BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF BELLWOOD, COOK COUNTY, ILLINOIS that the Bellwood Village Code be amended by adding the following new chapter thereto:

#### CHAPTER 37—REAL ESTATE BROKERS, REGULATING REAL ESTATE BROKERS AND PROHIBITING DISCRIMINATION IN REAL ESTATE TRANSACTIONS.

##### *Sec. 37-1. Title and Purpose of the Ordinance.*

Short Title. This ordinance shall be known and may be cited as the *Fair Housing Ordinance* of the Village of Bellwood, Illinois.

##### *Sec. 37-1.1 Purpose and Declaration of Policy.*

It is hereby declared to be the policy of the Village of Bellwood and the purpose of this ordinance, in the exercise of its police and regulatory powers for the protection of the public safety, for the health, morals, safety and welfare of the persons in and residing in the Village, and for the maintenance and promotion of commerce, industry, and good government in the Village, to secure to all persons living and/or working, or desiring to live and/or work in the Village of Bellwood, an equal opportunity to purchase, lease, rent or occupy real estate without discrimination based on race, color, religion, national origin or sex.



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### Sec. 37-1.2 *Construction.*

This ordinance shall be construed according to the fair import of its terms and shall be liberally construed to further the purposes and policy stated in Section 1 and the special purpose of the particular provision involved.

### Sec. 37-1.3 *Severability.*

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, the remainder of this ordinance and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

### Sec. 37-1.4 *Definitions.*

For the purposes of this ordinance:

- (a) 'Real Property' means any real estate, improved or unimproved within the Village limits, including rooming units.
- (b) 'Discriminate' means to make distinction in treatment of any person because of race, color, religion, national origin or sex.
- (c) 'Dwelling Unit' means a room or group of rooms designed for occupancy by one family with eating, sleeping and living facilities, or lodging rooms as defined in the Bellwood Zoning Ordinance.
- (d) 'Lease' or 'leasing' includes and means rent, renting, assignment, sublease and subletting.
- (e) 'Lending Institution' means any bank, insurance company, savings and loan association, other person in the business of lending money or guaranteeing loans, any person in the business of obtaining, arranging, or negotiating loans or guar-

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antees as agent or broker, and any person in the business of buying or selling loans or instruments for the payment of money which are secured by title to or a security interest in real estate, even though such lending institution does not maintain an office or place of business within the Village of Bellwood.

- (f) 'Owner' means any person who holds legal or equitable title to, or owns any beneficial interest in, any real property or who holds legal or equitable title to shares of, or holds any beneficial interest in, any real estate cooperative which owns any real property, or any person who is acting as the agent, manager, or employee of the owner, even though such owner does not reside within the Village of Bellwood.
- (g) 'Person' includes one or more individuals, corporations, partnerships, associations, legal representatives, mutual companies, unincorporated organizations, trusts, trustees in bankruptcy, receivers and fiduciaries, even though such person does not reside or maintain an office or place of business within the Village of Bellwood.
- (h) 'Purchase' includes any contract to purchase.
- (i) 'Real Estate Broker or Salesman' means any person licensed as a real estate broker or salesman in accordance with the provisions of Chapter 114½ Illinois Revised Statutes, or required thereby to be so licensed, who performs any function as such broker or salesman within the limits of the Village of Bellwood even though such broker or salesman does not maintain an office or place of business within the Village of Bellwood.

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- (j) 'Real Estate Transaction' means the purchase, sale, exchange, or lease of any real property, and an option to do any of the foregoing.
- (k) 'Sale' includes any contract to sell, exchange or to convey, transfer, or assign legal or equitable title to or a beneficial interest in real property.
- (l) 'Commission' means the Bellwood Human Relations Commission.

*Sec. 37-2. Prohibition of Discriminatory Acts by all persons.*

##### *Sec. 37-2.1 Discrimination Prohibited.*

No owner, lessee, or sub-lessee of real property, real estate broker, lender, financial institution, advertiser, or agent of any of the foregoing shall discriminate against any other person because of the race, color, religion, national origin or sex of each other person or because of the race, color, religion, national origin or sex of the friends or associates of such other person, in regard to the sale or rental of, or dealings concerning real property. Any such discrimination shall be considered an unfair real estate practice. Without limiting the foregoing, it shall be an unfair real estate practice and unlawful for any real estate broker or other person to:

##### (a) Advertisement

Publish or circulate, or cause to be published or circulated, any notice, statement or advertisement, or to announce a policy, or to use any form of application for the purchase, lease, rental, or financing of real property, or to make any record or inquiry in connection with the prospective purchase, rental or lease of real property, which ex-

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presses directly or indirectly any limitation or discrimination or any intent to make any such limitation or discrimination.

##### (b) Deceive or Overcharge

Deceive or overcharge any person for real property in the Village, or to make any distinction, discrimination, or restriction against any person as to the conditions or privileges of any kind relating to the sale, rental, lease or occupancy of real estate.

##### (c) Discriminate in Lending

Discriminate or to participate in discrimination in connection with borrowing or lending money, guaranteeing loans, accepting mortgages, or otherwise obtaining or making available funds for the purchase, acquisitions, construction, rehabilitation, repairs or maintenance of any real property in the Village.

##### (d) Change in Neighborhood

Solicit or to enter into any agreement for the sale, lease, or listing for sale or lease, of any real property within the Village on ground of loss of value due to the present or prospective entry into any given dwelling unit, block, street, neighborhood or area of any person or persons of any particular race, color, religion, national origin or sex.

##### (e) Inducing Sales

Distribute or cause to be distributed, written material or statements designed to induce any owner of any real property in the Village to sell or lease his or her real property because of any present or prospective change in the race, color, religion,

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national origin or sex in the area will or may result in the lowering of real property values in the block, neighborhood, or area in which the property is located.

### (g) Refusal or failure to sell

Refuse or fail to sell or rent real property because of race, color, religion, national origin or sex after the making of a bona fide offer.

### (h) Refusal to Show Records of Available Housing

Refuse or fail to show to any person who has specified his needs, the list or other records identifying all real properties reasonably meeting such specifications.

### (i) Withholding Housing

Represent to any person that any real property is not available for inspection, purchase, sale, lease or occupancy when in fact it is so available, or otherwise to withhold real property from any person because of race, color, religion, national origin or sex.

### (j) Refusal or failure to Show Real Estate

Refuse or fail to show real estate because of the race, color, religion, national origin or sex of any prospective purchaser, lessee, or tenant, or because of the race, color, religion, national origin or sex of the residents of the area in which the property is located.

### (k) Steering

To discourage another person from purchasing real property by representations regarding the presence or anticipated presence of persons of any

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particular race, color, religion, national origin or sex in the area or to otherwise make unavailable or deny the purchase of real property by representations regarding the presence or anticipated presence of persons of any particular race, color, religion, national origin or sex, which will or may result in the lowering of property values in the block, neighborhood, or area where the property is located.

To encourage another person to purchase real property in a certain area because of that person's particular race, color, religion, national origin or sex, and because of the presence or anticipated presence of persons of that particular race, color, religion or national origin in that certain area.

(l) Intentionally create alarm among residents of the Village of Bellwood, by transmitting in any manner, including a telephone call whether or not conversation ensues, with a design to induce any owner of real estate in the Village to sell or lease his property because of any present or prospective entry into the vicinity of the property involved of any person or persons of any particular race, color, religion, national origin or sex.

(m) Make any oral statement designed to induce any owner of real estate in the Village to sell or lease his property because of any present or prospective change in the race, color, religion, national origin or sex of persons owning any given dwelling unit, street, block, neighborhood, or area in the Village.

(n) Volunteer, in the capacity of a real estate broker or real estate salesman, to a prospective purchas-



er or lessee of any real estate in the Village, any information on the race, color, religion, national origin or sex of the residents of any given dwelling unit, street, block, neighborhood, or area in the Village.

#### Sec. 37-2.2 *Exemptions.*

This ordinance shall not:

- (a) Bar any religious or denominational institution or organization, or any charitable or educational organization operated, supervised or controlled by or in connection with a religious organization from limiting living accommodations, or giving preference with respect thereto, to persons of the same religion or denomination.
- (b) Apply to the leasing of rooms to roomers in a dwelling unit occupied by the owner or lessee of the entire premises as a family household having not more than two rooms exclusive of salaried household employees living on premises.
- (c) Apply to the sale or rental of any such single family house only if such house is sold or rented (1) without the use in any manner of the sales or rental services of any real estate broker, agent or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman or person and (2) without the printing, publishing or making of any notice, statement or advertisement with respect to the sale or rental of a dwelling unit that indicates any preference, limitation or discrimination based on race, color, religion, national origin, or sex; but nothing in this section shall prohibit the use of

attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title.

#### Sec. 37-3. *Enforcement.*

Sec. 37-3.1 It shall be the duty of the Bellwood Human Relations Commission to:

- (a) Initiate or receive and investigate complaints charging unlawful housing practices;
- (b) Seek conciliation of such complaint, hold conciliation hearings and make findings of fact in accordance with the provisions of this ordinance.

Conciliatory hearings conducted pursuant to the provisions of this ordinance shall be closed meetings and shall not be subject to "An Act in Relation to Meetings", Ill. Rev. Stat., Chap. 102, Sec. 41 et seq; provided, however, that no final action for the imposition or recommendation of a penalty by the Commission shall be taken except at a meeting open to the public.

- (c) Render from time to time, but not less than once a year, a written report of its activities and recommendations with respect to fair housing practices to the President and Board of Trustees; and
- (d) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

Sec. 37-3.2 Any person aggrieved in any manner by any violation of any provision of this ordinance or any person having knowledge of any violation of this ordinance, may file a written complaint within 60 days of the alleged violation with the Bellwood Human Re-

lations Commission. Said complaint shall state the name and address of the complainant and of the person or persons against whom the complaint is brought and shall contain a statement of facts describing the alleged violation.

Sec. 37-3.3 The Commission shall, within 5 days after a complaint is filed, serve a copy thereof either personally or by certified mail, return receipt requested, on the person or persons against whom the complaint is filed. The Commission shall also, within 5 days after the complaint is filed, forward a copy thereof to the President and Board of Trustees and the Village Attorney.

Sec. 37-3.4 Said Commission is hereby fully authorized immediately to investigate every such complaint thus filed. If the Commission determines that the respondent has not engaged in any unlawful practice, it shall state its findings of fact in writing and dismiss the complaint. If the Commission determines after such investigation that probable cause exists for the allegations made in the complaint, the Commission shall set a date for a conciliation hearing within two weeks of the filing of the complaint. Notice of such conciliation hearing shall be sent to all parties not less than 7 days before such hearings, stating the date, time and place of the hearing.

Sec. 37-3.5 At such hearing at least 2 members of the Commission shall interview the complainant and the person or persons against whom the complaint has been brought and shall attempt to resolve the complaint by all proper methods of conciliation and settlement. If such attempts at conciliation and settlement are not successful within 30 days after the date of fil-

ing of the complaint, the Commission shall then make findings of fact in writing setting forth which provisions of this ordinance the Commission believes have been violated and recommend in writing to the President and Board of Trustees that the Village Attorney proceed promptly in filing a complaint in a court of competent jurisdiction for violation of this ordinance or to seek such equitable relief as the Commission shall recommend.

Sec. 37-3.6 In addition thereto, the President and Board of Trustees may direct the Village Attorney to file with the Department of Registration and Education of the State of Illinois a complaint against any real estate broker found guilty of violating any provision of this ordinance, seeking suspension or revocation of the license issued to such broker by the State of Illinois.

The Village Attorney shall file a written report with the Commission and President and Board of Trustees as to the status of each civil or criminal complaint filed hereunder at least once a month.

#### Sec. 37.4 *Fine.*

Any owner, lessee or sub-lessee of real property, real estate broker, lender, financial institution or agent or any of the foregoing violating the provisions of this ordinance shall be fined not less than \$50.00 nor more than \$500.00 for each offense. Every day a violation continues shall be deemed a separate offense.

All ordinances or portions of ordinances in conflict with the provisions of this ordinance are hereby repealed.

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This ordinance shall be in full force and effect from and after its passage, approval and publication in the manner provided by law.

Passed And Approved this ..... day of July, 1975.

.....  
Village President

Attest:

.....  
Village Clerk